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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 624

THE UNITED STATES, PETITIONER

v.

THE TORONTO, HAMILTON AND BUFFALO NAVIGATION COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered in the above-entitled case on December 6, 1948.

OPINION BELOW

The opinion of the Court of Claims (R. 14-25) is reported at 81 F. Supp. 237.

JURISDICTION

The judgment of the Court of Claims was entered on December 6, 1948 (R. 25). The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the just compensation payable for a vessel requisitioned by the United States in 1942, after an eight-year period of idleness, may be determined on the basis of capitalization of the earnings realized from the enterprise in which the ship was used during the period from 1916 to 1932.

2. Whether, in determining just compensation for a vessel requisitioned in 1942 on the Great Lakes, the court may disregard a definite demand and prices prevailing for such vessels in that area because they did not reflect the most profitable use for which the vessels were physically adaptable, in favor of a more profitable demand on the Atlantic coast of Florida, in the absence of any showing or finding that the owner would have availed himself of the latter market.

STATUTE INVOLVED

The pertinent provisions of the Merchant Marine Act of 1936, as amended, 53 Stat. 1254, 1255, 46 U.S.C. 1242, are set forth in Appendix A, *infra*, p. 24.

STATEMENT

The findings of the Court of Claims (R. 4-14) disclose the following pertinent facts:

1. The *Maitland No. 1*, a car ferry, was built in 1916 for the carriage of railway freight cars on the Great Lakes. The vessel had a gross tonnage of 2,757 tons, with four railroad tracks on the car deck, having a capacity of 30 freight cars of the size in use in 1916 or 26 of the larger, modern type in use in 1942 (Finding 6, R. 5). The ves-

sel cost the original owner approximately $362,800. In August 1916, respondent acquired the vessel at a cost of $394,560, a mark-up of about 8.75 per cent (Finding 7, R. 5). Expenditures of $38,115.46 were made by respondent from 1917 to 1930 for additions and betterments to the vessel (Finding 8, R. 5).

From October 1916 to June 1932, respondent operated the *Maitland No. 1* on Lake Erie, between the ports of Ashtabula, Ohio, and Port Maitland, Canada, a distance of 91 miles. The vessel carried commodities loaded in freight cars moving between points in the Pittsburgh area, served by the New York Central Railroad, and points in Canada served by the Toronto, Hamilton and Buffalo Railway Company, and afforded a short cut from the rail route, which moved around the end of Lake Erie and through the congested Buffalo area (Finding 9, R. 5-6).

The *Maitland No. 1* was the only vessel owned and operated by respondent on its car ferry line. Respondent's chief source of revenue was derived from the transportation of bituminous coal to Canada, and its annual income over the sixteen and one-half years of operation fluctuated in accordance with the coal carried. From August 12, 1916, to January 1, 1921 respondent's average annual net operating income was $17,216.28. In 1921 and 1922, the car ferry was operated at a net loss. During the next five years (1923 to 1928), the net operating income averaged $129,893.92 per annum. In 1928, the net operating income declined sharply

below the 1927 earnings. This downward trend continued in 1929 and the vessel was operated at a loss in 1930, 1931, and 1932. By June 1932, traffic handled by the vessel had decreased to the extent that respondent laid up the vessel. The operation of the car ferry line was never resumed after that date. For the entire period from August 12, 1916, to June 30, 1932, respondent's annual average net income from the *Maitland No. 1* was $42,816.36, before Federal income taxes. This amounted to 10.41 per cent of respondent's investment (Finding 10, R. 6-7).

The sharp decline in respondent's net operating income from the *Maitland No. 1* in 1928 and 1929 was solely the result of a diversion of traffic to other routes. Prior to 1928 the bulk of traffic handled by respondent consisted of bituminous coal for movement to the Steel Company of Canada at Hamilton, Ontario. In August, 1928, this traffic was diverted to Sodus Point, New York, for movement across Lake Ontario to Hamilton. Most of the remaining traffic was lost in 1932 when the new Welland Canal was opened, enabling lake vessels to take shipments directly to Lake Ontario points. Since June 1932 there has been insufficient traffic available to justify ferry operation (Finding 11, R. 7-8). The vessel remained laid up until November 1935.

On November 29, 1935, respondent chartered the *Maitland No. 1* to the Nicholson Universal Steamship Company, which covered the tracks on the car deck with planking and used the vessel to carry

freight across Lake Michigan. On February 10, 1936 an agreement was made whereby title to the *Maitland No. 1* was transferred to Nicholson for a total consideration of $166,000, and respondent retained the right to recapture the vessel within a specified time. Respondent exercised this right on December 15, 1937, reacquiring title for $92,894.80 (Finding 12, R. 7-8).

Thereafter the vessel was again laid up at Ashtabula, Ohio, the captain and chief engineer remaining on board as shipkeepers, and minor repairs were made from time to time. From January 1, 1938, to August 20, 1942 the average annual cost of repairs was about $300.

2. On August 20, 1942, the War Shipping Administration, acting pursuant to the Merchant Marine Act of 1936, as amended, 46 U.S.C. 1242, requisitioned title to, and possession of, the *Maitland No. 1* on Lake Erie. (Finding 2, R. 4). The next day, a representative of the War Shipping Administration surveyed the vessel and estimated the repairs necessary to place her in operating condition at $34,980 (Finding 14, R. 9). Shortly after the requisition, the War Shipping Administration removed the machinery from the vessel and sold the hull to a purchaser who converted it into a barge (Finding 2, R. 4).

On April 20, 1943, the War Shipping Administration fixed the sum of $72,500 as just compensation for the *Maitland No. 1* (Finding 3, R. 4). On December 21, 1943, respondent notified the

War Shipping Administration that the amount fixed by it was unsatisfactory and that it elected to exercise its statutory right to receive 75 per cent of the award without prejudice to its right to sue for additional compensation. On June 10, 1944, respondent was paid the sum of $54,375 (Finding 4, R. 4).

On May 15, 1945, respondent, alleging that the fair value of the vessel was $766,128 (R. 3),[1] brought suit in the Court of Claims to recover additional compensation for the taking of the *Maitland No. 1* (R. 1-3).

3. The court found that "At the time she was requisitioned, the use to which the *Maitland No. 1* was best adapted was as a car ferry on the Great Lakes. At that time, however, there was no demand for the vessel as a car ferry on Lake Erie and there is no satisfactory proof that there was any demand for her for use as a car ferry elsewhere on the Great Lakes." (Finding 17, R. 9-10).

[1] On the date of requisition, the book value of the vessel, as shown on respondent's records was $75,509.51 (Finding 15, R. 9). This book value had been computed by deducting annual depreciation of four per cent from the $92,894.80 paid by respondent to Nicholson Universal Steamship Company on the "recapture" of the vessel, as described above (*supra*, p. 5). However, since respondent had initially taken depreciation from October 1, 1916, to December 31, 1919, at a rate of one per cent per annum and thereafter at the annual rate of four per cent, if the sale to Nicholson and the subsequent recapture are ignored as not representing *bona fide* sales, the net book value on August 20, 1942, would have been $37,096.13. From January 1, 1938, to August 20, 1942, respondent maintained insurance on the *Maitland No. 1* based on a valuation of $100,000 (Finding 16, R. 9).

Most operation of car ferries on the Great Lakes has centered on Lake Michigan and the Detroit River. The only car ferries which have ever operated elsewhere on the Great Lakes, so far as the present record discloses, are the *Maitland No. 1*, the *Ashtabula*, owned by the Pennsylvania Railroad, and the *Marquette and Bessemer No. 2*, jointly owned by the Marquette and Bessemer Dock and Navigation Company and the Pere Marquette Railway Company, all three of which operated across Lake Erie from Ohio to Canada. As noted above, lack of traffic and its diversion to other routes had caused respondent to take the *Maitland No. 1* out of service in the middle of 1932. The Pennsylvania Railroad continued the operation of its car ferry, since unlike the New York Central, it did not control a rail route into Canada. Neither in 1942 nor at any time subsequent thereto has the Pennsylvania Railroad required an additional car ferry to handle its traffic. The *Marquette and Bessemer No. 2*, referred to above, was laid up in 1931, was not operated thereafter, and was sold in March 1942 for $37,724.04.

With the exception of car ferries operated across the Detroit River, where an entirely different type of boat was used under different traffic conditions, the balance of the car ferries on the Great Lakes operated across Lake Michigan, chiefly between points in Michigan and in Wisconsin. Until about 1930, these car ferries held a competitive advantage over the all-rail transportation, both in respect

of time and rates. By 1930, the railroads completed "an outer belt" railroad around the City of Chicago, thus avoiding long delays, and the car ferry rate differential was abolished. Also, changes in traffic on the ferry lines required more clearance between the car decks and the cabin decks of the vessels. Thereafter, the ferry lines were unable to compete successfully with the all-rail routes. Vessels of the *Maitland No. 1* type became obsolete for further use as car ferries on the Great Lakes. By 1936 the majority of these outmoded car ferries had been laid up and were replaced by larger vessels, having greater speed, larger cargo capacity and passenger facilities (Finding 17, R. 9-10).

Accordingly, in 1942, the only demand on the Great Lakes for the *Maitland No. 1* was for a number of secondary uses, but such a demand for non-car-ferry uses did exist (Finding 18, R. 10). Between 1936 and 1940 three car ferries, similar to the *Maitland No. 1,* which had been laid up for a number of years, were sold for conversion to highway ferries (for transporting automobiles and passengers) in the Great Lakes area. In 1936, the Ann Arbor Railroad sold the car ferry *Ann Arbor No. 4,* which was smaller than the *Maitland No. 1,* to the Michigan Highway Department for $25,000. In 1938, the Pere Marquette Railway Company sold the car ferry *Pere Marquette No. 20,* which had been built in 1903 from the same plans as the *Maitland No. 1,* to the Michigan Highway Department for the price of $50,000, plus an additional $10,000 for delivering the vessel across Lake Mich-

igan to a shipyard. In 1940, the Pere Marquette Railway Company sold the car ferry *Pere Marquette No. 17,* which had been built in 1901 (from the same plans as the *Maitland No. 1,*) to the Michigan Highway Department for $65,000 (Finding 18, R. 10-11). Although the *Pere Marquette Nos. 17 and 20* were comparable to the *Maitland No. 1* in size, carrying capacity, speed and design, they were in a poorer state of repair on the dates sold than was the *Maitland No. 1* on the date of requisition (Finding 19, R. 11).

In 1940 and 1942, two other obsolete car ferries, which had been laid up and which likewise were in a poorer state of repair than the *Maitland No. 1,* were sold to purchasers who removed the engines from the boilers, tore off the superstructure of the vessels, and used them as bulk carriers of pulpwood. In July 1940, the Pere Marquette Railway Company sold the *Pere Marquette No. 19* for $24,000. The vessel was built from the same plans as the *Maitland No. 1* and was a sister ship of the *Pere Marquette No. 20,* referred to above. In March, 1942, the *Marquette and Bessemer No. 2* was sold for $37,724.04. She had been built in 1910 from the same plans as the *Maitland No. 1,* was jointly owned by the Marquette and Bessemer Dock and Navigation Company and the Pere Marquette Railway Company and had formerly been used as a car ferry on Lake Erie (Finding 21, R. 13-14).

4. The Court of Claims then went on to find that there was a demand in 1942 on the Atlantic Coast

for vessels such as the *Maitland No. 1* for use as a car ferry between Florida and Cuba (Finding 20, R. 12).

In May, 1941, the Florida East Coast Railroad Company sold the *Henry M. Flagler,* a car ferry which had operated between Florida and Cuba for $100,000. The *Flagler* was built in 1914 from substantially the same plans as the *Maitland No. 1* but was equipped to operate in and had been used in salt water. As in the case of the *Maitland No. 1,* the *Flagler* had been laid up for ten years prior to the sale. Between May, 1941 and July 28, 1941, the purchaser expended $65,820 for necessary repairs. On July 28, 1941, the W. S. A. requisitioned the vessel and appraised her value at $170,000, which the owner accepted as just compensation (Finding 20, R. 12).

In June, 1942, the W. S. A. requisitioned two ocean-going car ferries, the *Joseph R. Parrott* and the *Estrada Palma,* comparable in age, dimensions and construction to the *Maitland No. 1,* which were owned by the Florida East Coast Railroad Company and had been operated by that company between Florida and Cuba. By negotiation between the parties, a value of $332,500 for each vessel was agreed upon, and the company accepted $665,000 in full payment (Finding 20, R. 12-13).

Shortly after the cessation of hostilities in World War II, the Grand Trunk Railway Company sold the *Grand Haven,* a car ferry formerly operated on the Great Lakes, for $50,000. The *Grand Haven*

was built in 1903, was smaller than the *Maitland No. 1* but had more speed and power. At considerable expense, the amount of which is not shown in the record, she was floated down the Mississippi River and converted for use as a ferry between Florida and Cuba (Finding 20, R. 12).

At the time of the requisition of the *Maitland No. 1* it would have cost not less than $115,000 to move her to the Atlantic Coast and fit her for operation in salt water. In addition, some strengthening of the framing would probably have been required before the *Maitland No. 1* could be classified for ocean-going service. There is no evidence as to how much these additional changes would have cost (Finding 20, R. 13).

5. After making the foregoing findings, the court concluded, in its opinion, that the fair value for the *Maitland* must be determined as of the putative Florida location, and that since the sales transactions described above did not establish a sufficiently fair and adequate value for the vessel, resort must be had to other methods to establish her value (R. 22-23). Despite the fact that the *Maitland No. 1* had been laid up since June 1932 and respondent had filed an application with the Interstate Commerce Commission on February 11, 1943, for leave to abandon its car ferry line because "traffic is not available in sufficient quantities to warrant continued operation, even if a suitable car ferry were available" (Finding 11, R. 8), the court declared "we are compelled to resort to a con-

sideration of the earnings of the *Maitland No. 1* during the time the vessel was actually operated as a car ferry, in conjunction with the contemporaneous transactions in vessels of close similarity in determining a fair value" (R. 23).

Attributing an average mean residual value of $50,000 to the *Maitland No. 1* as an obsolete car ferry, the court capitalized the average annual income of $42,816.36 received from 1916 to 1932 at an annual rate of 10 per cent for the estimated 24 years of useful life remaining and arrived at the sum of $389,767.15 (R. 23). The court then noted that "This figure approximates the amount paid by defendant to Florida East Coast Car Ferry Company for the car ferries, *Joseph R. Parrott* and *Estrada Palma*" (R. 24). Since the normal useful life of a car ferry operated in salt water is only 80 per cent of such a ferry operated in fresh water, the court reduced the value of the *Maitland No. 1* by 20 per cent to $311,813.72. Next, the estimated necessary repairs of $34,980 (Finding 14, R. 9) were deducted. Finally, since it would have cost at least $115,000 to move the *Maitland No. 1* to the Atlantic Coast and fit her for salt water operation, that sum was also deducted, leaving a balance of $161,833.72 (R. 24). Although the court found that there had been an enhancement of $11,420 in the value of vessels in the Atlantic Coast between 1941 and 1942 because of the greater demand for vessels which occurred after the beginning of World War II (Finding 20,

R. 13), such enhancement was ignored in making this computation.

The court, with two judges dissenting, concluded that the fair value at the time of taking was $161,833.72. Since petitioner was entitled to credit for the sum of $54,375 paid on June 10, 1944, interest was awarded respondent at 4 per cent per annum for delay in payment on $161,833.72 from August 20, 1942, to June 10, 1944, and on $107,458.72 from June 10, 1944 to date of payment (R. 24).

Judge Whitaker (with whom Madden, J. concurred) dissenting, was of the opinion that the capitalization of earnings was improper because "at the time of its requisition it was earning nothing and had earned nothing for quite a long time" (R. 24). Adverting to the price at which comparable vessels sold on the Florida East Coast, he pointed out that this basis for valuation "presupposes that the owner of this vessel on the Great Lakes would have been able to sell his vessel after he had transported it down there, and there is no showing whatever that it would have been able to do so. I feel quite sure that plaintiff would not have gone to the expense of $115,000 to transport the vessel to the Florida East Coast in the hope of finding a purchaser there. Just compensation is to be determined not only as of the time of the taking but also as of the place of taking. * * * The War Shipping Administration fixed $72,500 as just compensation. I do not think the plaintiff has carried the burden of showing that this was incorrect" (R. 25).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In making an award of just compensation for the *Maitland No. 1* which was not based on a determination of the value the vessel had at the place of taking (the Great Lakes) but the value which it might have had if it were located on the Atlantic coast of Florida.

2. In making an award of just compensation for the *Maitland No. 1* (which was taken in August 1942), predicated upon a capitalization of respondent's realized earnings during the period from 1916 to 1932.

3. In making an award of just compensation for the *Maitland No. 1* which was not based on a determination of value at the time and place of taking.

4. In disregarding its findings of the evidentiary or primary facts in making its ultimate finding that "the fair value of the *Maitland No. 1* at the time of the requisition was $161,833.72."

5. In making an ultimate finding (that the fair value was $161,833.72) which was not sustained by its findings of the evidentiary or primary facts.

6. In failing to deduct, as required by Section 902 of the Merchant Marine Act of 1936, as amended, 46 U.S.C. 1242, from its ultimate finding of the fair value of the *Maitland No. 1,* the sum of $11,420 found to represent the enhancement of value due to the greater demand for vessels after the beginning of World War II.

7. In failing to make the ultimate finding that

the fair value of the *Maitland No. 1* at the time and place of taking was no more than $72,500.

8. In failing to hold that respondent has not carried the burden of showing that the sum of $72,500 fixed by the War Shipping Administration as just compensation for the *Maitland No. 1* was incorrect.

9. In entering judgment for respondent in the amount of $107,458.72, with interest at 4 per cent per annum for delay in payment on $161,833.72 from August 20, 1942, to June 10, 1944, and on $107,458.72 from June 10, 1944, to date of payment.

REASONS FOR GRANTING THE WRIT

In determining the just compensation to be paid for the taking of the *Maitland No. 1* in August 1942 at the Great Lakes, the Court of Claims has resorted to the doubly novel procedure, first, of basing its award largely upon a capitalization of respondent's realized income from 1916 to 1932, despite the fact that the vessel had been laid up for eight years and was obsolete for further use as a car ferry on the Great Lakes, and, secondly, of relying heavily on a demand and possible market for a vessel such as the *Maitland* as a car ferry on the east coast of Florida, some thousands of miles from the place of taking, even though a definite demand did exist at the Great Lakes for such ships for secondary, non-car-ferrying uses. These unusual and erroneous rulings sharply depart from the accepted principles of eminent domain, and raise important and substantial questions bearing on pending just compensation litigation for merchant ships requisitioned during the war.

1. Assuming that no actual market value could be ascertained, the court below stated "we are compelled to resort to a consideration of the earnings of the *Maitland No. 1* during the time that the vessel was actually operated as a car ferry * * *" (R. 23). By capitalizing the average annual income of $42,816.36 earned by respondent from 1916 to 1932 at an annual rate of 10 per cent for the estimated remaining 24 years of use for the ship, and attributing an average mean residual value of $50,000 to it as an obsolete car ferry, the court obtained the basic sum of $389,767.15 (R. 23).[2] We submit, however, that the court erred seriously in assigning a value to the *Maitland* grounded on capitalization of respondent's realized income. It must be borne in mind that that which was requisitioned was not the business enterprise of respondent, but a vessel which was used in the business. Whatever the merits of capitalization of income when an entire business enterprise, such as a public utility, is condemned (Bonbright, *Valuation of Property* (1937), ch. XI, XII, XVI, *passim;* Orgel, *Valuation Under Eminent Domain* (1936), ch. XIV, XV, XVII-XIX, *passim*), that method can be clearly misleading when employed to estimate the value of property owned by the business enterprise. Cf. Lewis, *Eminent Domain* (3d ed. 1909) § 727; Nichols, *Eminent Domain* (2d ed. 1917), pp. 1171-1173 (realty). Before

[2] The process by which this figure was reduced to $161,833.72 in order to take into account the cost of making it available on salt water, and in Florida, is described on page 12, *supra*.

such evidence could properly be considered competent, some means would have to be devised whereby measurable shares of the total earnings could be allocated to the respective income producing factors of invested capital, management skill, and general business conditions. Moreover, a capitalization of profits already realized means nothing, unless these profits may reasonably be expected to continue.

Applying these considerations to the case at bar, it is plain that no reliance can be placed upon such capitalization. During the sixteen and one-half years of operation of the *Maitland,* the average annual net income of respondent fluctuated as follows: 1916 to 1921—$17,216.28; 1921 to 1922—net loss; 1925 to 1928—$129,893.92; 1930 to 1932—net loss (Finding 10, R. 6). On its face, such variation in income shows that it would be impossible to attribute any particular fraction of the earnings to the vessel itself. As the findings reveal (Finding 11, R. 7-8), the income of respondent was dependent upon the adequacy of other traffic routes and not upon any income producing qualities inherent in the *Maitland. Supra,* pp. 3-4. Even if this obstacle of allocation were surmountable, the fact remains that respondent has not operated its car ferry line since June 1932; at no time since that date has there been traffic sufficient to justify vessel operation (Finding 11, R. 8). It is inconceivable that a "willing buyer" would give any weight to capitalized earnings which neither had continued in the

past nor could be expected to continue. If demand is lacking for a property because it is non-productive, it cannot be urged that its present value may, nevertheless, be measured by its past earnings. Nor does the possibility of profitable operation of the *Maitland* as a car ferry between Florida and Cuba affect the bearing of capitalization of realized income upon the vessel's current value. Conceivably, capitalized prospective earnings would be relevant; however, it is sheer speculation to estimate the value of the *Maitland* as an ocean car ferry from its income, from twenty-five to ten years before, as a fresh water car ferry. Such income was earned under other management, was derived mainly from the transportation of coal, was subject to all-rail competition, and, in short, resulted from a host of different factors.

Finally, it is evident that such uncritical use of capitalization of income realized from 1916 to 1932, to determine fair value in 1942, violates the unquestioned rule that value is to be ascertained as of the time of taking. See *United States* v. *Miller*, 317 U.S. 369, 374; *Kieselbach* v. *Commissioner of Internal Revenue*, 317 U.S. 399, 403; *Danforth* v. *United States*, 308 U.S. 271, 283; *Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106, 123; *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 76; *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 341.

2. a. Although the *Maitland* was requisitioned in the Great Lakes area where a demand existed for such vessels for secondary uses (*supra*, pp.

8-9), the Court of Claims predicted its higher finding of value in large part on the existence of a demand for similar ships on the Florida East Coast for use as car ferries between Florida and Cuba.[3] But the general rule, announced by this Court in dictum, is that just compensation for personal property must be determined as of the place of taking, especially when there is a market for the commodity at that spot (*United States* v. *New River Collieries Co.*, 262 U.S. 341, 344; *Davis* v. *Newton Coal Co.*, 267 U.S. 292, 301). The rule as thus formulated is identical with the measure of damages for breach of contract or for tortious conversion. In actions for breach of contract, the market value at the time and place where the contract should have been performed is the basis for assessing damages. In cases of wrongful destruction of, or injury to, personal property, the market value of the place of wrong is used. See 3 Williston, *Sales* (Rev. ed., 1948), §§ 599, 599e; Sedgwick, *Damages* (9th ed., 1912), p. 1543; McCormick, *Damages* (1935), p. 182. In all these cases, the purpose of the judgment is to indemnify the plaintiff for his loss, without more,[4] and an award of market value at the time

[3] For the purposes of this petition, no exception is taken to the finding of the lower court that a demand did exist, at the time of taking, on the Florida East Coast for a vessel such as the *Maitland No. 1* for use as a car ferry (Finding 20, R. 12). However, it should be pointed out that the court made no finding that if the *Maitland* had been transported to the Atlantic coast it would have been sold for that purpose. See *infra*, pp. 21-22).

[4] *Bauman* v. *Ross*, 167 U. S. 548, 574; *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 304; *United States* v.

and place of the taking or wrong constitutes a fair measure of the loss, since that is the sum for which the plaintiff would presumably have sold the property to another or can now replace it for his own use.

Here, the court concedes that there were a number of secondary uses for the *Maitland* for which a demand did exist in 1942 on the Great Lakes (Finding 18, R. 10), and the findings reveal that (aside from the 1937 sale of the vessel itself) five vessels of the car-ferry type had been sold on the Great Lakes, during the period from 1936 to 1942, at prices ranging from $24,000 to $65,000 (Findings 18-21, R. 10-14). *Supra,* pp. 8-9. This definite home market was disregarded because there was no demand in that vicinity for the car-ferry use which would have been the most profitable employment for the vessel (R. 23). But the law of just compensation does not require property to be valued at its highest price, wherever that highest market may happen to be. True, consideration should be given to the "highest and most profitable use for which the property is adaptable", but only if the need or likelihood of need for such use exists "in the reasonably near future", and only to the extent that "the prospect of demand for such use affects the market value while the property is privately held." *Olson* v. *United States,* 292 U.S. 246, 255; see also

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New River Collieries, 262 U. S. 341, 343; *United States* v. *Miller,* 317 U. S. 369, 373; Bonbright, *Valuation of Property* (1937), p. 409; McCormick, *Damages* (1935), p. 181.

Boom v. *Patterson*, 98 U.S. 403, 408; *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 81; Lewis, *Eminent Domain* (3rd ed. 1909), pp. 1232-1233. The proper inquiry is not what might be the value of the property for a particular use if it were located at some other part of the country, but what it is now worth in the available market, in view of its adaptability for that special use and all others. If the particular use does not affect the market price in the place of taking because of the character of the existing demand, the concept of fair value as indemnification does not require that resort be had to other, distant, markets, unless the owner shows clearly that he would actually have dealt in those places. Without such a showing, to select the location of greatest value, as the Court of Claims did here, would normally grant a windfall to the owner who would receive more than he would probably have gotten from a private purchaser or than he would have to pay for a replacement.

On the respondent rests the burden of proving all the elements of its claim for just compensation (*United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 273; *United States* v. *John J. Felin & Co., Inc.*, 334 U.S. 624, 631; *Westchester County Park Commission* v. *United States*, 143 F. 2d 688, 692 (C.A. 2); *Ralph* v. *Hazen*, 93 F. 2d 68, 70 (C.A.D.C.); *Welch* v. *T.V.A.*, 108 F. 2d 95, 101 (C.A. 6)), but it made no proof that it would have sold, or attempted to sell, the *Maitland* on the Atlantic coast of Florida. Owners of bulky property,

like ships, do not ordinarily expend large sums (here, $115,000) for transportation to higher markets on the chance that a sale might be made there at a better price. And the Court of Claims made no finding that respondent would have been able to sell the vessel had it been transported to the coast, nor that respondent would have gone to the expense of placing the *Maitland* on the Florida market in the hope of finding a purchaser. The court likewise made no finding that a demand existed on the Great Lakes for vessels of this type to be transported to the Atlantic seaboard and fitted for operation as an ocean car-ferry.[5] In fine, there was no warrant for discarding the demand existing at the place of taking for vessels like the *Maitland*, and basing the award on a different demand which existed only at a single distant spot.[6]

b. Twenty-four cases involving claims totaling $9,817,537.57 for vessels requisitioned on the Great Lakes are presently pending in the lower courts.[7] It is anticipated that, in reliance upon the decision below, an attempt will be made to secure awards grounded on the higher prices prevailing on the

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[5] In fact, the only comparable vessel that was acquired for such purpose sold for $50,000 (R. 12), less than the administrative award offered respondent.

[6] The Court of Claims also erred in not deducting from the value it found for the *Maitland* on the Atlantic coast the enhancement of $11,420 which occurred, as the court found, between 1941 and 1942 because of the greater demand for vessels after the beginning of World War II (Finding 20, R. 13). Cf. Brief for the United States, *United States* v. *Cors*, No. 132, this Term, now pending decision.

[7] See Appendix B, *infra*, p. 26.

Atlantic coast, without any showing that these coastal markets were available or normal for Great Lakes vessels. The instant holding indicates that the Court of Claims will be receptive to such contentions, with the result that inflated judgments will be granted in this class of ship requisition cases.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH 1949.

APPENDIX A

Section 902 of the Merchant Marine Act of 1936, as amended, 53 Stat. 1254, 1255 (46 U.S.C. 1242) provides, in part, as follows:

> (a) Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition. The owner shall not be paid for any consequential damages arising from a taking or use of property under authority of this section.
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> (d) In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon

as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code (U.S.C., 1934 edition, title 28, secs. 41, 250).

APPENDIX B

Pending Just Compensation Cases Involving Vessels on Great Lakes

Vessel	*Owner*	*Claim*
A. H. Smith	Great Lakes Transit Corp.	$ 2,253.21
Back Bay	Gartland SS Co.	269,596.00
Bennington	Gartland SS Co.	94,364.00
Brockton	Gartland SS Co.	230,645.00
C. T. Jaffray	Great Lakes Transit Corp.	1,005.90
Daniel Willard	Great Lakes Transit Corp.	395.32
Duluth	Great Lakes Transit Corp.	407.42
Edward Chambers	Great Lakes Transit Corp.	974.31
Fred W. Sargent	Great Lakes Transit Corp.	2,748.43
Fleetwood	Nicholson Transit Co.	270,000.00
George D. Dixon	Great Lakes Transit Corp.	387.32
J. E. Gorman	Great Lakes Transit Corp.	1,241.19
H. A. Scrandrett	Great Lakes Transit Corp.	1,038.30
J. M. Davis	Great Lakes Transit Corp.	707.25
Lucinda Clark	Waterways Transp. Inc.	24,100.00
Mizpah	Eugene F. McDonald, Jr.	348,750.00
Octorara	Sand Products Corp.	1,003,333.33
Ontario	Tugboat Ontario Inc.	202,059.50
P. E. Crowley	Great Lakes Transit Corp.	534.92
Sable	Detroit & Cleveland Nav. Co.	7,348,570.00
Spikes	A. J. Huch, exec.	10,000.00
Utica	Great Lakes Transit Corp.	2,257.13
W. J. Conners	Great Lakes Transit Corp.	436.50
W. W. Atterbury	Great Lakes Transit Corp.	732.54
		$9,817,537.57

Source: Appendix D to Brief for the United States in *United States* v. *Cors*, this Term, No. 132, checked against Green's Great Lakes Directory, 1942 edition.

☆ U. S. Government Printing Office, 1949 J827459/463